Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Telecommunications Act of 1996:	)	
	)	
Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information;	)	CC Docket No. 96-115
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended	)	CC Docket No. 96-149
	)	
2000 Biennial Regulatory Review – Review of Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers	)	CC Docket No. 00-257

COMMENTS OF WORLDCOM, INC.

WorldCom, Inc. ("WorldCom") respectfully submits the following comments on the petitions for reconsideration filed by Verizon, AT&T Wireless Services, Inc. ("AT&T"), and the Arizona Corporation Commission ("ACC") in the above-referenced dockets.[1] Specifically, WorldCom urges the Commission to reconsider its decision in the

[1] *Verizon's Petition for Reconsideration of Third Report and Order in CC Docket No. 96-115*, filed in CC Docket No. 96-115 (Oct. 21, 2002) ("*Verizon Petition*"); AT&T Wireless Services, Inc., *Petition for Reconsideration*, filed in CC Docket Nos. 96-115, 96-149, and 00-257 (Oct. 21, 2002) ("*AT&T Petition*"); *The Arizona Corporation Commission's Petition for Clarification and/or Reconsideration*, filed in CC Docket Nos. 96-115, 96-149, and 00-257 (Oct. 21, 2002) ("*ACC Petition*").

Third Report and Order[2] not to preempt state regulations of customer proprietary network information ("CPNI") that are more restrictive than the federal CPNI rules. WorldCom also urges the Commission to deny the *ACC Petition*. As explained below, the Commission's recently adopted rules adequately address the ACC's concerns.

I. Background

In implementing section 222(c)(1) of the Act, which governs the use and disclosure of CPNI upon the "approval of the customer,"[3] the Commission initially adopted "opt-in" rules that required the express consent of the customer before a carrier could share CPNI with affiliated entities or unaffiliated third parties.[4] The Court of Appeals for the Tenth Circuit invalidated this opt-in regime on the grounds that the Commission had not justified its rules under the First Amendment standards applicable to governmental regulations of commercial speech articulated in the Supreme Court's

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[2] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended; 2000 Biennial Regulatory Review – Review of Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 17 FCC Rcd 14860 (2002) ("*Third Report and Order*").

[3] 47 U.S.C. § 222(c)(1).

[4] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061, ¶¶ 87-114 (1998) ("*Second Report and Order*").

Central Hudson decision.[5] On remand, the Commission concluded that an opt-in rule for intra-company and joint venture use of CPNI was unconstitutional, and, accordingly, adopted a less restrictive "opt-out" mechanism, allowing intra-company sharing of a customer's CPNI unless that customer has objected to such sharing within a specified waiting period after receiving appropriate notification from the carrier.[6] In adopting this less restrictive regime, the Commission also reversed its earlier policy with respect to preemption, stating that it would not presumptively preempt more restrictive state CPNI regulation, but rather would exercise its preemption authority on a case-by-case basis.[7] Verizon and AT&T filed petitions for reconsideration of this decision, arguing that the Commission should presumptively preempt state CPNI rules that are more restrictive than the Commission's rules.

II. The FCC Should Preempt More Restrictive State Regulation of CPNI

WorldCom acknowledges that under the Communications Act of 1934, as amended ("the Act"), there are many circumstances in which both federal and state regulation can and should coexist. In this case, however, the Commission should preempt state regulations that are more restrictive than the Commission's national rules. First, section 222 of the Act establishes a national regulatory framework with respect to

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[5] *U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999) ("*U.S. West*"), *cert. denied*, 530 U.S. 1213 (2000). *See also Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557 (1980) ("*Central Hudson*").

[6] *Third Report and Order* ¶ 31; 47 C.F.R. § 64.2003(i). The Commission retained an opt-in mechanism for disclosure of CPNI to third parties.

[7] *Third Report and Order* ¶¶ 69-70.

CPNI.[8] As explained below, there are significant constitutional concerns associated with allowing the states to enact regulations that are more restrictive than the Commission's rules for intra-company CPNI. Second, there is no reason to believe that there are significant state-specific variations with respect to consumers' privacy expectations that could justify stricter regulation of intra-company CPNI in any particular state. Third, it is infeasible for many carriers, including WorldCom, to distinguish between the interstate and intrastate aspects of CPNI.

Given the decisions by the court of appeals and the Commission with respect to the constitutionality of opt-in rules, it is extremely difficult to imagine a state CPNI rule that is both more restrictive than the Commission's current opt-out rule and constitutional. Under *Central Hudson*, a regulation restricting commercial speech is unconstitutional unless the government can show that: (i) it has a substantial interest in regulating the speech in question; (ii) the restriction in question directly and materially advances that interest; and (iii) the regulation is narrowly drawn.[9] It is highly unlikely that any state would be able to develop record evidence with respect to any of these prongs that is significantly different from that already developed by the Commission in the *Third Report and Order*.[10] In particular, it is highly unlikely that any state will have a significantly greater interest than the Commission in regulating the intra-company use of CPNI or that the relevant facts will vary significantly from state to state.

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[8] 47 U.S.C. § 222.

[9] *See Third Report and Order* ¶ 27.

[10] Indeed, as AT&T points out, the Commission adopted the *Third Report and Order* only after considering extensive evidence supplied by various parties, including state regulatory commissions. *AT&T Petition* at 2.

For instance, in applying the first prong of the *Central Hudson* test, the Commission determined that section 222(c)(1) "assumes a minimum level of customer concern regarding certain uses of CPNI by a carrier and its affiliate[,]" and that this assumption was "borne out by evidence in the record[.]"[11] It is difficult to see how any state could develop record evidence showing that consumers in that particular state have developed a level of concern for *intrastate* aspects of CPNI that is significantly higher than the level already identified in the *Third Report and Order*. Indeed, it is highly unlikely that consumers have developed *any* privacy expectations with respect to intrastate CPNI that are different from their expectations regarding interstate CPNI. Since the Commission has already taken account of the best available record evidence regarding consumers' expectations with respect to the intra-company use of CPNI, and found that only the less restrictive opt-out mechanism passes constitutional muster, there is no point in inviting states to develop records that cannot plausibly differ from that already before the Commission. As explained above, the only result of such an invitation would be to encourage a patchwork of inconsistent state regulations that cannot be sustained on constitutional grounds.[12] The Commission should forestall such a possibility by presumptively preempting all such regulations.

If the Commission does not preempt inconsistent state rules, it is likely to impose significant costs on carriers and consumers alike. Many carriers, including WorldCom,

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[11] *Third Report and Order* ¶ 33.

[12] At least two states have already proposed rules that appear to be unconstitutional. *See* Wa. Admin. Code § 480-120-203 (proposed); *Order Instituting Rulemaking on the Commission's Own Motion to Establish Consumer Rights and Consumer Protection Rules Applicable to All Telecommunications Utilities*, Rulemaking 00-02-004, Appendix B (CA P.U.C. July 17, 2002).

do not distinguish between the inter- and intrastate aspects of CPNI, and it would be infeasible – both operationally and economically – for them to institute systems that could make such distinctions.[13] As a result, to the extent any state enacted more restrictive regulation of intrastate CPNI, carriers likely would be forced to apply those regulations for all aspects of CPNI. In addition to imposing significant costs, this result would clearly violate carriers' First Amendment rights by effectively requiring carriers to comply with CPNI rules that are more restrictive than the Commission has found to be permissible under the Constitution. The Commission therefore should reconsider its decision to address inconsistent state regulations regarding intra-company CPNI on a case-by-case basis, and instead adopt a policy of presumptively preempting all such regulations.

III. The Commission Should Deny the Arizona Corporation Commission's Petition

As WorldCom understands the *ACC Petition*, the ACC is concerned that the opt-in mechanism set forth in the *Third Report and Order* would permit carriers to release CPNI information "to any unrelated third parties," without first providing the customer adequate information about the identity of such third parties.[14] The ACC apparently believes that the Commission should address these concerns either by clarifying the existing standard for opt-in notice to customers, or by adopting a more restrictive standard.

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[13] *See Verizon Petition* at 5-6.

[14] *ACC Petition* at 3; *see also id.* (arguing that the opt-in mechanism adopted in the *Third Report and Order* "appears to create a situation where once having given opt-in consent, the consumer has no knowledge of who will receive his or her proprietary information.").

WorldCom can discern no basis for the Commission to grant the *ACC Petition*. First, the ACC appears to overstate the extent to which the opt-in mechanism allows "unlimited release of CPNI to *any* unrelated third parties."[15] In fact, newly adopted section 64.2008 of the Commission's rules expressly states that the notification required under both opt-in and opt-out "must specify the types of information that constitute CPNI *and the specific entities that will receive the CPNI*, describe the purposes for which CPNI will be used, and inform the customer of his or her right to disapprove those uses, and deny or withdraw access to CPNI at any time."[16] It thus seems clear that the neither the opt-in nor the opt-out mechanism allows the kind of wholly indiscriminate release of CPNI that seems to concern the ACC.

In addition, the Commission should not adopt a more restrictive mechanism for disclosure of CPNI to third parties. In fact, the Commission has already rejected just such an approach. In the *Third Report and Order*, the Commission noted that "[r]equiring express prior written approval, such as a letter of authorization, would be the most restrictive means of obtaining customer approval" for disclosure of CPNI to third parties.[17] The Commission rejected this overly restrictive approach and explained its reasons for so doing.[18] The ACC offers no new facts or legal arguments on this point. The Commission should therefore reaffirm its decision to adopt an opt-in mechanism for disclosure of CPNI to third parties.

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[15] *Id.* (emphasis added).

[16] 47 C.F.R. § 64.2008(c)(2) (emphasis added). *See also* 47 C.F.R. § 64.2008(e) (the contents of opt-in notification must comply with the requirements of section 64.2008(c)).

[17] *Third Report and Order* ¶ 60. It is also worth noting that section 222(c)(2) of the Act (on which the ACC relies) does not require "written consent" to disclose to a third party; rather, it requires "disclosure upon written request by the customer[.]" In other words, a written request is a sufficient but not a necessary condition for disclosure.

[18] *Id.* ¶ 61.

IV. Conclusion

For the foregoing reasons, the Commission should presumptively preempt state CPNI regulations that are more restrictive than the federal CPNI rules, and reaffirm its decision to adopt an opt-in mechanism for disclosure of CPNI to third parties.

Respectfully submitted,

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Certificate of Service

I, Ruth E. Holder, hereby certify that on this 27th day of December, 2002, I caused a true and correct copy of the foregoing Comments of WorldCom, Inc. to be mailed, postage prepaid, to:

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